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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 606

UNITED STATES OF AMERICA,
Petitioner,

v.

SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH.

BRIEF OF DEFENDANT ELIAS BAYER IN OPPOSITION

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This brief is submitted on behalf of defendant Elias Bayer in opposition to the petition of the United States that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals, Second Circuit, reversing the convictions of respondents Bayer for conspiracy to defraud the United States.

Opinion Below

The opinion of the Circuit Court of Appeals has not yet been reported. It is found in the record at pages 1467-76.

Jurisdiction

The judgment of the Circuit Court of Appeals was filed on August 14, 1946. Thereafter, on September 13th, the Government's time to file the present petition was extended to October 12, 1946.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

1. Whether the Trial Court committed error in its charge to the jury and its refusal to charge, with reference in particular to the theory of the defense of defendants Bayer.

2. Whether the Trial Court committed reversible and prejudicial error in refusing permission to put in evidence the slip of the Telephone Company, showing that a collect call was made by Radovich from Arlington to Bayer's office in New York City on November 24, 1943, and in denying the motion of the defense for a new trial after refusing to receive the slip in evidence.

The opinion of the Circuit Court of Appeals bases its reversal of the conviction of the Bayers upon the errors committed by the Trial Judge in the two foregoing respects (pp. 1467-73). The opinion then adds (p. 1473, lines 14, 15): "In view of the charge of conspiracy, reversal as to the Bayers necessitates also a reversal as to Radovich." At that point the opinion might have terminated. The Circuit Court of Appeals then proceeded to consider the admissibility of Radovich's statements, which in nowise affected the appeal of the Bayers. The Government's reasoning, therefore, at page 34 of its petition, in subdivision numbered "3", first paragraph thereof, is a *non sequitur*

and without merit, because the judgments of conviction were not reversed for the Bayers on account of the erroneous admission of Radovich's statements; but, to the contrary, the Radovich conviction was reversed on account of the serious errors committed as to the Bayers in connection with the charge of the Trial Judge and the exclusion of the Telephone Company slip.

Statutes Involved

Section 37 of the Criminal Code, 18 U. S. C. 88, provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Preliminary Statement

The references in this brief are to the *folios* in the record unless otherwise stated.

The indictment, in a single count (22-32), charges the three defendants with conspiracy to defraud the United States under Title 18, Section 88, United States Code. It charges that, beginning on or about September 1, 1942, defendants combined with each other, and with other persons whose names are unknown, to defraud the United States of its right to the conscientious, faithful, disinterested and unbiased services and judgment of officers of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud, and, more particularly, its right to the conscientious and faithful services and judgment of defendant Radovich as an officer of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud.

It is alleged that as a part of the conspiracy defendants Samuel Bayer and Elias Bayer became acquainted with various officers, entertained and made gifts to them, and gave sums of money amounting to approximately $7,000 to defendant Radovich, an officer, with intent to influence his action and to induce him, in violation of his lawful duty, to transfer Privates Martin Bayer and Melvin Usdan, both soldiers, from and to various units of the United States Army in order that they would not be attached to a unit which was about to be sent out of the continental United States. The indictment sets forth a number of overt acts in furtherance of the conspiracy (28-32).

After a lengthy trial the jury, on October 23, 1945, returned a verdict of guilty with a recommendation for the "*highest degree of clemency for all three defendants*" (3526).

On the next day the Court sentenced Samuel Bayer to a term of imprisonment of two years and a fine of $10,000 and Elias Bayer to a term of imprisonment of eighteen months and a fine of $5,000; and Radovich to a term of one year and a day (3632-4). The jail sentence of two years for Samuel Bayer was in excess of the United States Attorney's recommendation of eighteen months; and the jail sentence of Elias Bayer to eighteen months was in excess of his recommendation of a year and a day (3533-5).

Statement of Facts

All references herein are to the *folios* in the record.

At the conclusion of the trial, the case against the Bayers (assuming there was any sufficient case at all) came down to certain financial transactions between them and Radovich. Those transactions were the subject of the summations and of the charge. There was no evidence of corruption of or by any other officer and no such issue was submitted to the jury.

Neither of the Bayers nor Radovich testified. Certain written statements taken from each by the investigating officers were put in evidence. The statement by Radovich was objected to by the Bayers' counsel and was expressly received by the Court solely as evidence against Radovich and against him alone (fol. 1976).

The theory of the Bayer defense was that the Bayers were the victims of coercion and duress practiced upon them by Radovich; that he extorted money from them by threats and menaces of violating his duty; and that the payments were made in the hope that these grave threats would not be carried out but that, on the contrary, he would perform his duty.

In the eye of the law as well as by any standards of morals, an assent or conduct forced by coercion, duress or threats of exposure to bodily harm or danger is not an assent or voluntary conduct at all and certainly is not conduct to defraud the United States.

As we shall show hereinafter, not only was this defense not accurately or appropriately set before the jury in the charge, but actually it was (as we submit) misstated; and the jury were bound to infer that in law it was no real defense at all and that essential factors in it were irrelevant.

The following statement is presented for the purpose of showing how forceful and substantial that defense was in point of fact and how vital to the rights of the Bayers was a full, correct and clear charge concerning its factual and legal bases. (*Bollenbach* v. *United States*, 90 L. Ed. 318; 66 Sup. Ct. 402, 405; 326 U. S. 607; *Bird* v. *United States*, 180 U. S. 356, 361; *M. Kraus & Bros., Inc.* v. *United States*, 66 Sup. Ct. 705, 719; 14 Law Week (March 26, 1946) 4252.)

Samuel Bayer and Elias Bayer, two brothers, were engaged in the business of manufacturing yarn and thread under the name of Plymouth Thread & Rayon Corporation, and thread converting under the name of Thread Converters, Inc., with offices at 30 West 21st Street. They

enjoyed a very good reputation and had never previously been in any difficulty. Their good character was testified to by the president of a bank, their minister and by business men and attorneys of repute (2451-71; 2638-55). The elder, Samuel, has three sons, Martin, Robert and Sanford. At the time of the trial, Martin, a soldier, was in Burma; Robert, a soldier, was at Okinawa; and Sanford, a sailor, was aboard a United States warship (2477).

In December 1942, Martin Bayer, then eighteen years of age, and Melvin Usdan, a nephew of Samuel and Elias Bayer, voluntarily enlisted in the United States Army Air Corps (2481; 3702-3). Martin was not strong, had suffered from rickets and was only accepted upon his urgent request (2480-8). After being sent for a short time to Camp Upton (2489), both young men, within two weeks of their enlistment, were assigned to duties as filing clerks in the Headquarters Base, Mitchel Field, Long Island (2495). Being volunteers, they were entitled to choose the branch of the service in which they wished to serve and they had designated the Air Corps (828-9).

In January 1943, while at a night club in New York City, Elias Bayer met two officers, who were stationed at Mitchel Field, Lt. Col. Vidal and Lt. Roser (396-8; 3817). They entered into conversation and became quite friendly (3817). The officers asked Elias about his business and, on being told, they inquired if he knew anybody in the uniform manufacturing business and about the possibility of securing uniforms at a wholesale price (3817-18). Elias responded in the affirmative and the officers took his telephone number (3847).

A month later the officers telephoned him, came to his office, and there met Samuel for the first time (399-403; 3818). A conversation followed concerning the procurement of uniforms at wholesale. Elias Bayer accompanied the officers to the establishment of I. Buss Company, run by three brothers named Busch, one of whom was a brother-in-law of Samuel Bayer. Elias introduced them and

arranged for their buying uniforms at wholesale prices (3819-20). It was Elias Bayer's understanding that the officers would pay for the uniforms (3848). This was also understood by Harold Busch (562; 590; 607-8).

Subsequently, a friendship developed between these two officers and the Bayers (3820; 3715-18). Through them, Elias Bayer met Lt. Col. Jacobson of the First Fighter Command at Mitchel Field (1090; 3820). Col. Jacobson thereafter met Samuel Bayer at the office and was extended the same courtesy of purchasing a uniform at wholesale price from the Buss Company (1094-5; 3820).

While Col. Jacobson was at Bayer's office he noticed the pictures of the two young soldiers, Martin Bayer and Melvin Usdan, in uniform on the wall of the office (2760-3; 3673). He inquired about them and Samuel Bayer told him that the boys were filing clerks at Mitchel Field in the Headquarters Base Command (2761-2; 3822-3; 3673). Col. Jacobson stated that he could use clerks in his outfit and said that he was going to have them transferred (2762-3; 3822-3; 3673-4).

In April 1943, without any request from the Bayers, Col. Jacobson requisitioned the boys from the Headquarters Base to his own command, the First Fighter Command (2501; 1101-3; 2761-3; 2822-3). Col. Jacobson, a witness for the Government, testified that he had not acted upon any inducement from the Bayers and that they had never requested him to do anything improper or corrupt (1136; 1149). Indeed, *no witness called by the Government testified to any improper action or favoritism so far as the two young soldiers were concerned, done at the request of the Bayers or otherwise* (fols. 429; 432-4; 540; 544-5; 867; 1136; 1149).

Defendant Radovich—then a Captain, a flyer—was the commanding officer of Privates Bayer and Usdan (1103; 2503). He met Samuel and Elias Bayer through the other officers, above mentioned, and under similar circumstances. He likewise wished to procure a uniform at wholesale price and was introduced by Elias Bayer to the Buss Company (3673-4; 3822-4).

While Elias Bayer had understood that the uniforms would be paid for (3848) and the officers had been given bills at wholesale prices in the packages containing the uniforms (598-9), none of them paid the Buss Company (596; 3847-8). Some of them complained that the uniforms did not fit and Radovich returned both of his to the Buss Company (3740-1; 3849-50; 596-7; 451-2). Being unpaid, the Buss Company, a small concern, called upon the Plymouth Thread Corporation to pay for the uniforms, which it thereafter did (498-9; 596; 3737-8; 3848).

At no time was there any suggestion of impropriety or corruption, according to the testimony of the officers who were witnesses for the Government. Not a single one testified that he was ever requested or induced by the Bayers to perform any act in derogation or violation of his duties to the Army (429; 432-4; 540; 544-5; 867; 1136; 1149).

Radovich visited the office of Samuel Bayer very frequently (2767-8; 3674-5; 3824). He accepted much hospitality. It soon became apparent that he was greedy and avaricious. He showed an acquisitive interest in things which he saw around the office (3743). For example, he hinted about a traveling bag of Samuel Bayer and received a similar one (3743-4) and, again, a set of golf clubs which belonged to Martin Bayer were loaned to him but he never returned them (3790-1). He took advantage of the privilege of purchasing theatre tickets, which he charged to the account of Plymouth Corporation (3772; 3881). The other officers were entertained and on one occasion, upon his birthday, a set of automobile tires was given by Samuel Bayer to Col. Jacobson (1108-16). His relations with Elias Bayer were close (1134) and they had exchanged gifts. For example, when a child was born to the Elias Bayers, Col. Jacobson presented them with a baby blanket (1156-7). Col. Jacobson, testifying for the Government, stated that he had never done anything for Samuel Bayer in return (1136; 1149-50). In fact, all of the officers were called as Government witnesses and uni-

formly testified that *they had done nothing in their official capacities for the Bayers and had never been requested to do anything improper or corrupt* (429; 432-4; 540; 544-5; 867; 1136; 1149).

Samuel Bayer was greatly concerned about his son, Martin, who, as above stated, was not strong and vigorous and had been accepted only upon his own insistence (2480-8). Martin was given no physical training by the Army to fit him for the combat service of a soldier. He received only two weeks' basic training (2495). He was given work as a filing clerk, for which he apparently was best suited (2498). It was obviously never the intention of the Army officers to make a combat soldier of him. The same appeared true of Melvin Usdan, who received only about one week's basic training (2492). He likewise was a filing clerk (2495).

When Radovich became friendly with Samuel Bayer he learned of the extreme solicitude of Samuel for the welfare of the boys and promptly proceeded to prey upon it. He was a young man, active, strong and daring—a flyer—and he told Samuel of the dangerous nature of his work (3686-8). Unquestionably, he was a brave soldier, but his purpose was formulated to take advantage of Samuel's great interest in the boys. This is shown conclusively by the subsequent developments.

In the early summer of 1943, Radovich came to Samuel Bayer's office and informed him that something had occurred at Mitchel Field which required him to transfer Martin Bayer and Melvin Usdan to another camp (3676-6; 3826). The boys were happy at Mitchel Field and Samuel Bayer asked Radovich to leave them alone (3676). He said he could not and thereupon left Bayer's office (3676). He returned on the following day and told Samuel Bayer that he had an angle through which he could have the boys transferred to the Medical Unit at Mitchel Field (2772-3; 3676-7; 3828-9). At the same time, he told Samuel Bayer that he needed $500 in order to send his wife home

to Los Angeles (2775-6; 3677; 3829). Samuel Bayer was taken aback at Radovich's suggestion. He had extended hospitality in the form of entertainment and gifts but never in the form of money. He told Radovich that he did not have that amount of money available, but to come in on the following day (2776). He was uncertain whether it was a loan to Radovich or a hold-up (3677; 3829-30). On the following day he gave Radovich $450 (3746; 3830). He could have given him $500 but did not wish Radovich to think that he could pay out such large sums of money with ease (3677).

Radovich returned to Bayer's office about a week later and said that the transfer to the Medical Unit was going through and at the same time said that he needed $500 additional, but gave no explanation for his request for this additional money (3679; 3830; 2776). Samuel Bayer, by this time, was in fear of Radovich's control over the boys and was worried that harm might come to them, so he promised to give Radovich the money (3679). To use Samuel Bayer's words, "I was scared if I didn't give it to him he will take it out on my kids" (3679).

Some days later, Radovich again called at Samuel Bayer's office and told him that the application for transfer to the Medical Unit had fallen through and that the boys would have to go overseas (3679; 3831-2). This coercive assertion was made by Radovich in spite of the fact that the young men had received at the most only two weeks of basic training and could not properly be sent overseas (2492-5; 2630-3). Radovich told Samuel Bayer that he needed $1,000 and assured him that if that amount were paid the applications would be approved (3680; 3832). Samuel Bayer was greatly upset at the prospect that the boys might be transferred overseas without any adequate basic training and he was fearful of the power of Radovich over the boys (3679-80; 3749). While at first he delayed about giving Radovich the money, he told Radovich to call him up later on. A few days later Radovich telephoned to Samuel

Bayer, requested the money and asked Bayer to meet him at the Radio City Theatre (3680). Samuel Bayer went to the theatre and met Radovich there. They walked to Radovich's car, which was parked at the corner, and there Samuel Bayer gave Radovich $500, informing him that he would try to get together some more money within a few days (3680-1; 3752-3). A little later on, Radovich telephoned Samuel Bayer and asked Bayer to meet him at the St. Moritz Hotel, where Bayer then gave him $400 (3681; 3754-5). On the following day, Radovich went to Bayer's office and succeeded in obtaining an additional $600 (3681; 3755).

Upon applications made in the regular form by Martin Bayer and Melvin Usdan, at the instance of a 1st Lieutenant of the Medical Corps at Mitchel Field (Dft. Bayers' Exh. D), they were transferred from the First Fighter Command to the Medical Unit at the same field. The labor there was arduous and Usdan testified they worked both day and night (2518-19). They remained there for about a week (2518; 3682-3). They received orders for their transfer—Martin Bayer to Bradley Field, Connecticut, and Melvin Usdan to Westover Field, Massachusetts (2520). They were attached, at these Fields, to the Medical Unit of Airborne Engineers (2522). They remained at these Fields throughout the late summer and early autumn of 1943 (2525-9). There was nothing to show that these transfers were obtained through corruption by Radovich. They went through in the regular way. The only evidence admitted against the Bayers established that they were part of the general scheme concocted by Radovich in order to extort money from Samuel Bayer through the exercise of mental duress.

In about September 1943 Radovich became a member of a secret project commanded by Col. Philip Corcoran, which was to operate behind the Japanese lines in Burma as a commando unit (631-2; 780; 686-7; 698). This unit was strictly voluntary in its nature and was intended for

well-trained, daring volunteers (631-2; 686-98). Radovich had broad authority to select any members of it (2785). But the work was so hazardous that nobody was required to become a member without his consent, even though he had been selected (632; 686-98; 793; 807-8). The assembly point of this unit was Goldsboro, North Carolina. Corcoran, or Radovich, designated and selected the members, which would be followed by a notification from Col. Goetz in Washington of the necessary orders for the transfer (755-63). The notification would result in orders as a matter of course. A young woman, Miss Goertz, in Col. Goetz's office, would prepare these orders at the request of Corcoran or Radovich (757-63).

In the meantime, Radovich had not abandoned his scheme to extort money. Shortly after the boys were transferred respectively to Westover and Bradley Fields, Radovich telephoned Samuel Bayer and informed him he knew who was responsible for the transfer of the boys from the Medical Unit and that if Bayer paid him $1500 additional he would have them re-transferred to Mitchel Field (2779; 3684-5). Samuel Bayer remonstrated and "asked him to please forget about it, to leave the boys alone as they were very happy where they were at their new station" (2779; 3684-5). For the time being Radovich subsided (3685).

For about a month Samuel Bayer did not hear from Radovich. Then Radovich telephoned to Bayer's office, talked with his secretary, Miss Solomon, and she made an appointment for Radovich to meet Bayer and herself at the McAlpin Hotel in New York City (2781-3; 3685-6). He was accompanied by another officer. They dined together and Radovich related his flying exploits (3686). The apparent purpose of this McAlpin meeting was to impress upon Samuel Bayer the dangerous nature of Radovich's new duty.

Subsequently, nothing was heard from Radovich for maybe six weeks or two months (3686). Then, suddenly,

on November 24, 1943, Radovich telephoned to Miss Solomon, at Bayer's office, from Arlington, Virginia, near Washington, and which is the location of the Pentagon Building of the War Department (2779-80; 3360-1; 3386; 3508-13; 3788). This is borne out by the slip of the Telephone Company, which became available after the case was submitted to the jury and while the jury was out (3508-18). It shows that a telephone call was made "collect" by Radovich from Arlington, Virginia, to Chelsea 3-2872, which is the Bayers' telephone number in New York City, on November 24, 1943. It was error for the Judge to refuse to admit this slip in evidence, for it directly corroborates the testimony of Miss Solomon (see Point II, *post*). Exception was taken to the ruling which excluded it (3519). Radovich said that he was flying to New York and that it was very important for him to meet her and Samuel Bayer. An appointment was thereupon made for lunch at Cavanagh's Restaurant (2780; 3686-7). There were present Radovich, Samuel Bayer and Miss Solomon (2784; 3686). Radovich told them that he was attached to a commando unit which was going abroad to the Burma-India front "on a very dangerous mission" and that it "would write history" (2784; 3687-8). He told Bayer that he was taking Martin Bayer and Melvin Usdan with him as members of this commando unit, "and if the boys were lucky enough to return they would return in eight months" (2784-5; 3688). The boys, as Samuel Bayer knew, were utterly unfitted and untrained for such work and had received no substantial amount of basic training (2492-5; 2630-3). Nevertheless Radovich had already, on November 22, 1943, selected these inexperienced and unqualified young men as members of the Special Commando Unit and, in fact, orders for their transfer from their posts at Bradley Field and Westover Field had already been issued at Radovich's insistence (764-6).

Samuel Bayer remonstrated and asked Radovich "why he was taking it out on the boys" (2785; 3688). Radovich responded that he had the authority to do it, that "he could do anything he wanted" (2785), but that if Samuel Bayer

would pay him $5,000 he would release the boys from the unit into some other outfit (2785-6; 3688-9).

Thereupon Samuel Bayer begged Radovich not to interfere with the boys but to leave them alone (3689; 2787). Radovich's response was that the boys would have to go with him and that Samuel Bayer should not worry "because maybe if the boys were lucky they would come home alive" (2787; 3688).

Samuel Bayer kept on pleading with Radovich, who insisted that the money must be paid promptly. Radovich turned a deaf ear to the pleas of Samuel Bayer (2787; 3689). He finally gave Samuel Bayer a direction for the payment of the money (3689).

On the same day that Radovich was making these demands, Martin Bayer telephoned to his father and told him that he and Melvin Usdan had been assigned to Goldsboro, North Carolina, and were going through New York City en route (3687).

On the very next morning Radovich came to Bayer's place of business and asked, "What did you decide?" (2788-9; 3690). Samuel Bayer again begged him to leave the boys alone. Radovich replied that it was not up to him alone but that he had to pay most of the money to others in order to prevent the departure of the boys with the commando unit, and he advised Samuel Bayer to act promptly (2788-9; 3690-1). Elias Bayer, who overheard some of the conversation, also then pleaded with Radovich to leave the boys alone, to which Radovich replied by giving an "ultimatum" that the money had to be delivered to Goldsboro by a certain date (3835-8).

During the course of these discussions the two young men were reporting to the commando unit at Goldsboro, North Carolina (786-91; 2551-60; 2585-7).

Finally yielding to the demands of Radovich, Samuel Bayer sent $5,000 to Radovich, which was delivered to him at Goldsboro in the latter part of November by an unnamed person, who was accompanied by Elias Bayer (3758; 3765-6; 3839-41).

When Martin Bayer and Melvin Usdan reported at Goldsboro, Lt. Col. Boebel, who was the Adjutant of the Air Commando group at the time when they arrived, found them unfit for its purposes (791-2; 795-6; 817-18). He testified that he told Radovich, "I do not think these are the type of men we want in our organization. They are not the calibre of man that we are looking for" (795-6). He directed Radovich to transfer them out of the unit (795-6; 817-18). They remained there about a week (2546-7). Radovich, in full possession of the $5,000, arranged the transfer of Martin Bayer and Usdan to the Newcastle Army Air Base, Air Transport Command, at Wilmington, Delaware (767-9; 2546). Thus, Radovich had fully accomplished his scheme of extortion; the payment made by Samuel Bayer had been coerced from him by Radovich, who had refused to do his true duty by the boys and had included them in a commando unit for which they had not volunteered and were not fitted, and who took advantage of the situation which he had created, in order to conceive and execute his wrongful purpose.

The theory of the defense, which was not accurately or clearly set forth by the Trial Court in his charge to the jury, is that they wanted Radovich to do his duty as an officer, not to violate it; that Samuel Bayer made the payments, not to corrupt Radovich, but in order to induce him to act properly and conscientiously toward the two young soldiers.

These two boys had only two weeks of basic training and were not fit for Radovich's Commando Unit, which was intended for highly dangerous special duty in the Pacific, nor had the boys volunteered for such duty, though it was a voluntary unit, nor were they physically or by training equipped for such a task. Hence, Radovich's duty was to exclude them from the unit—*not* to include them.

It was further the theory of the defense that the payments made by the Bayers were coerced and extorted from them by Radovich, who would not do his true duty by the

boys, but would discriminate improperly against them, unless he was paid, and who took advantage of the situation to frighten the Bayers in order to conceive and execute an outrageous plan of extortion.

Quite apart from the statements of the two Bayers, the theory of the defense is borne out by the testimony of Melvin Usdan, Captain Pepper, Lt. Colonel Boebel and of Miss Anne Solomon, and the Telephone Company's slip showing Radovich's "collect" call to Bayer from Arlington on November 24, 1943. Stress is laid upon this fact because, as will be hereinafter shown, the jury was not instructed adequately or properly, either on the elements of the offense as charged in the indictment or upon the theory and basis of the defense thereto. Nor was the guilt of the Bayers established beyond a reasonable doubt, as required by the law.

POINT I

The Trial Court committed serious errors in its charge to the jury and in its refusals to charge. The charge with reference to the theory and nature of the defense of the defendants Bayer was inadequate, mixed up and unclear. It tended to confuse the jury, not to enlighten them.

A

The only allegation in the indictment is that in violation of the language of Title 18, Sec. 88, U. S. Code, the defendants Bayer had conspired with certain Army officers, including Radovich, "to defraud the United States" of its right to their faithful performance of their duties.

The Court, in its charge, appears to have assumed that the evidence must be deemed to sustain the indictment only in connection with Radovich, since the charge turns only on the relationship between defendants Bayer and Radovich.

No issue of bribery of Radovich by defendants Bayer is involved. The crime of bribery was not charged; and the Bayers were not on trial for such an offense. The only issue for the jury was whether the Bayers had voluntarily entered into a corrupt agreement with Radovich whereby he was to perform less than his duty as an Army officer. The basis of the defense was that defendants Bayer were the victims of duress and coercion exercised upon them by Radovich and that, therefore, they did not voluntarily agree to prevent Radovich from performing his duty, but, to the contrary, were frightened and coerced into paying him money in order that he would not commit upon Privates Martin Bayer and Melvin Usdan the gross violations of duty which he was wrongfully threatening.

The Court charged the jury (3397-8) that the essence of the offense was the conspiracy to deprive the United States of its right to the faithful services of Radovich as an officer of the United States Army. The indictment alleges, however, that the conspiracy was to defraud the United States of the faithful service of officers (note the plural) of the United States Army, and particularly of Radovich.

In accordance with the verbiage of the indictment, a mass of proof was received from one Army officer after another, who testified that they had received gifts from the defendants Bayer. None of them testified that the Bayers asked them to do anything improper. In fact, they testified affirmatively on cross-examination that no attempt had been made to influence them improperly (Statement of Facts, *ante*).

None of the foregoing proof should have been received if, as the Judge said, "the gist of the charge made in the indictment" was a conspiracy to defraud the United States of the honest services of Radovich. If Radovich alone was involved, the testimony of the many Army witnesses who had no connection whatever with Radovich, was inadmissible. While this proof was not objected to at the time it was received, this fact is immaterial, because it was not until the close of the case that the Court ruled in its

charge that the gist of the conspiracy was to defraud the United States of the faithful services of Radovich alone.

Certainly, the presence of this mass of testimony, which had no legitimate bearing upon the factual or legal issue ultimately submitted to the jury, made imperative a full and clear charge and presentation to the jury of both the factual and legal bases of the Bayer defense as to this sole final issue.

B

Exception was taken (3436) to the failure of the Court to charge adequately on the theory of the defense of the defendants Bayer (*Bollenbach* v. *United States*, 326 U. S. 607, 90 L. Ed. 318, 66 Sup. Ct. 402, 405; *Bird* v. *United States*, 180 U. S. 356, 361; *M. Kraus & Bros., Inc.* v. *United States*, 66 Sup. Ct. 705, 710; *Thomas* v. *United States*, 151 F. 2d 183, 187).

This exception is extremely important. Indeed, it goes to the essence of the case. The basis of the defense was that the Bayers were the victims of extortion in the form of mental duress exercised upon them by Radovich. In other words, that there was no agreement on the part of the Bayers to pay money to Radovich but that they were the victims of chicanery and extortion employed upon them by Radovich, who was refusing and threatening to refuse to do his true duty.

No denial was made that they had paid him money, but they explained in their statements that this was the result of a "hold-up" and that the payments were actuated by their fear that harm would come to the two young soldiers, by reason of Radovich's wrongful tactics, since they had not received sufficient basic training to be sent overseas. The Court, in its charge, though it fully outlined the theory of the prosecution, neglected the theory of the defense. The Court merely said (3400-1):

> "Counsel for the defendants Bayer claims that payments of money by defendant Samuel Bayer to defendant Radovich were made as the result of express

or implied threats by defendant Radovich to improperly and unfairly include Privates Martin Bayer and Melvin Usdan in the Air Commando Group organized for an immediate dangerous overseas mission, which would be a violation of his duty as an officer."

This was a mere description—and both incomplete and inadequate—of the defendants' claim. It was not a charge as to the extent to which in law it would be a defense or as to the rules of law which should be applied to its component elements.

It will be observed that there was no statement by the Court that the jury could find that there had been no agreement on the part of the Bayers if the jury believed the contention of the defense, namely, that the Bayers were the unfortunate victims of a shrewd plan of extortion. The Judge should have instructed the jury that, if the jury found that the moneys were obtained by Radovich from the Bayers as the consequence of a scheme of extortion concocted by Radovich, in that event there would not be a voluntary agreement, which is the essence of a conspiracy under United States Code, Title 18, Section 88. It will also be noted that the Court made no mention that the Air Commando unit was a voluntary one and that a special type of man was needed for it. Furthermore, as will be shown (Subd. F, *post*), the Court refused defendants' requests to charge as to these important matters.

These errors are greatly accentuated by two further errors in the Court's instructions to the jury.

In the first of these errors the Court told the jury, in practical effect, that the defendants Bayer would be guilty even though the payments of money were involuntary on their part. Thus the Court said (3401):

"If you believe from the evidence beyond a reasonable doubt that at any time during the period alleged these three defendants mutually agreed to defraud the United States as alleged in the indictment, and did some act in pursuance of such agreement, they would be guilty irrespective of whether the actual payment of money were made voluntarily or involuntarily."

This instruction was grossly misleading and is covered by the exception taken to the failure on the part of the Court to adequately charge on the theory of the defense (3436).

Certainly, if the payments were made by the Bayers involuntarily and as a result of duress, implied threats and coercion, the jury should have been instructed that they could find that there was no agreement on the part of the Bayers, inasmuch as it was the result, not of *a true meeting of the minds*, but of extortion and duress. The Court, on the other hand, charged in effect that if the defendants Bayer paid money to Radovich, the fact that such payment was made "involuntarily" would constitute no defense if it were made as part of an "agreement". The Court did not call the jury's attention to the vital consideration, which was fundamental in the defense, that if the so-called "agreement" was wrung from the Bayers by threats and coercion, then it and any payments made pursuant to it were not voluntary and, in consequence, the defense would be established. It was grave error for the Court to fail to include and submit the issue of whether the "agreement" which preceded the payment of the money was made voluntarily or involuntarily. This was basic and reversible error because it failed to submit to the jury a clear-cut issue of fact which constitutes the difference between, on the one hand, the position of the defendants Bayer as the victims of an extortion plot practiced upon them by Radovich through threats to violate his duty, and, on the other hand, their alleged position of voluntary contracting parties in a conspiracy to seduce Radovich from performing his duty.

In other words, to confine, as did the Court, the question of voluntary or involuntary action to the mere payment of the money, without also extending it to include the issue of the "agreement" alleged to antedate the payment of the money, was fundamental error.

The jury evidently sensed this fundamental distinction in the moral quality of the Bayers' acts but felt themselves

prevented by the Court's charge from giving that distinction expression in the field of law. In no other way can their extraordinary recommendation of the highest degree of clemency be accounted for.

In the second of these errors the Court in effect instructed the jury to find the defendants Bayer guilty, even though the jury should find that the payments made by them were the result of coercion and extortion. This was the charge of the Court (3403):

> "However, in your consideration of this phase of the case, I charge you that the matter of whether or not the payments were made at the suggestion of Samuel Bayer or upon the demand of Radovich, or whether the payments were made cheerfully or grudgingly, or whether or not they were greater than Samuel Bayer expected, are immaterial if you are satisfied beyond a reasonable doubt that the payments were made by and in the course of the agreement of the defendants."

The foregoing instruction was highly misleading and prejudicial. In effect, the jury was instructed to find the defendants Bayer guilty, even though the so-called "agreement" and their payments under it were the consequence of the extortionate threats of Radovich and were made as the result thereof, and even though all they desired was that Radovich should perform his *true duty* as to the boys.

A payment made under duress, as the result of extortion, is certainly not a voluntary payment and would negative the existence of a voluntary agreement, which is the very basis of a conspiracy to defraud. It cannot be disputed that, in the eye of the law as well as of good morals, an assent or conduct which is brought about by coercion, duress or threats of exposure to bodily harm or danger, is not an assent or voluntary conduct at all (*Williston, Contracts*, Vol. III, Secs. 1622-3; *17 C. J. S., Contracts*, Secs. 168, 169, 175).

Such coercion and duress create an intent to avert the threatened disastrous consequences, and negative an intent to defraud.

In any event, the charge was inadequate and misleading so far as the theory of the defense is concerned. It was "so cryptic as to be difficult to understand, if not to be actually misleading to a jury of laymen," to use the language of the Circuit Court of Appeals.

In the very recent case of *M. Kraus & Bros., Inc.* v. *United States*, 66 Sup. Ct. 705, 710, decided by the Supreme Court on March 25, 1946, this Court said (slip opinion, p. 9):

> "'A conviction ought not to rest upon an equivocal direction to the jury on a basic issue.' *Bollenbach* v. *United States*, — U. S. — (slip opinion, p. 5)."

See also, *Bihn* v. *United States*, decided by this Court on June 10, 1946; 90 L. Ed. 1208.

C

In the indictment Samuel Bayer was indicted as follows: "Samuel Bayer, alias Samuel Boyarsky". Elias Bayer was indicted as follows: "Elias Bayer, alias Elias Boyarsky".

There was not the slightest justification for the use in the indictment of an alias for the defendants Bayer. They had no criminal record. They were not using two names. There was no question as to their identity. Their name was "Bayer", and by that name they were known throughout all the events here involved. The inclusion of the alleged "alias" was grossly unfair and prejudicial.

An examination of the record shows that the Government brought out no proof to justify the use or allegation of such an "alias". The purpose undoubtedly was to create suspicion and prejudice. Indeed, it would carry an inference of prior wrong-doing or criminality.

At the close of the charge a request was made to charge the jury on the subject matter of "alias" and that the jury should be instructed to disregard it completely (3440).

It was pointed out that no proof of any use of an alias had been offered by the Government. The Judge did not cure the error but, to the contrary, he unfortunately accentuated it when he charged the jury as follows (3455-7):

> "It has been called to my attention that the indictment as to the two defendants Bayer, refers to them as Samuel and Elias Bayer, alias Samuel Boyarsky and Elias Boyarsky. I charge you that there is no inference to be drawn by you from that statement in the indictment. The literal meaning of the word 'alias' is 'other or otherwise', and carries no inference. However, in common acceptation of the word it sometimes is considered to refer to a person who has more than one name for improper purposes. There is no proof about that, and I charge you to not infer anything of an evil nature from the fact. I do not think on the other hand that you should infer any improper conduct on the part of the Government by so naming them in the indictment, because it appears somewhere from their statements, I think, that the name Boyarsky was their Russian name before they became Americanized. So I direct you to disregard the alias reference entirely."

Exception was taken to the Judge's charge on the alias as in itself inflammatory (3458-60).

It was pointed out at the time of sentence that the use of the alias in the indictment, as well as the charge on that subject, injected an atmosphere of prejudice, particularly because of the reference to the former Russian nationality of the Bayers (3566-72). An unfortunate atmosphere was brought into the case, which was emphasized by references to the religion of the Bayers and the young men, which had occurred during the course of the trial, particularly in the testimony of Captain Pepper, who would not deny saying that the boys were Jewish (730-1) and that he may or he may not be prejudiced (749-50; see also fols. 2047; 3566-72).

The jury should have been instructed definitely that the Government should not have included the alias in the in

dictment. And, certainly, the Judge should not have told the jury "that the name 'Boyarsky' was their Russian name before they became Americanized" (3456-7); particularly, where an offense is involved which concerns patriotic duties, no such reference should have been made. This is not harmless error, which may be disregarded under the "harmless error" statute (28 U. S. C. A., Sec. 391), but it goes to the essence of the case, since, we submit, it deprived the defendants Bayer of a fair and impartial trial free from any atmosphere of prejudice or bias.

It should be noted that the Court was not justified in stating, in connection with the matter of the "alias" (at fols. 3456-7), that it appeared from the statements of the Bayers "that the name Boyarsky was their Russian name before they became Americanized". We have read the statements in evidence of the Bayers (Government's Exhs. 8 to 22) and can find nothing herein which shows that their name was Boyarsky. There is simply an answer that they were born in Russia but we find nothing which justifies the inclusion of an alias in the indictment. The emphasis laid on the "alias" "Boyarsky" would tend to engender prejudice on the part of the jury.

D

The Court had been requested to charge in Defendants' 28th Request, in paragraph (i), as follows:

> "(i) While it is your duty to confer with your fellow jurors and discuss the evidence with them, the verdict which you render must represent the real judgment and honest conclusion of each of you, and I charge you, upon your oaths and as a matter of law, that each of you has the duty of arriving at your conclusion separately, and that no one of you may surrender his earnest belief concerning the guilt or innocence of the defendants, for the purpose of preventing a disagreement or arriving at a compromise" (3272-3).

This was an entirely proper request, especially under the circumstances of this case, namely, that the verdict should represent the real judgment and honest conclusion of each of the jurors (*Allen* v. *United States*, 164 U. S. 492).

The Court did not cover this subject in its charge and declined to charge as requested, to which exception was taken (3432). This error is emphasized by the apparently compromise verdict which the jury returned, in which the jury stated (3526): "We find them guilty, with the highest degree of clemency for all three defendants.". This verdict followed a deliberation from 11:45 A. M. (3460) until 9:02 P. M. (3525), in the course of which the jury had asked for further instructions, particularly with regard to the charge concerning conspiracy (3461-5). It may well be that, had the Judge given the charge as requested, the jury would have acquitted or disagreed, instead of bringing in a verdict of guilty and recommending "the highest degree of clemency".

E.

Exception was taken (3431) to the failure of the Court to charge the 16th request to charge (3262) that fraud is never presumed but must be proven. That point is important here because of the form of indictment, which merely alleges that the United States was defrauded of Radovich's honest services. The Judge did not properly charge the jury on this element of the offense although requested to do so. Indeed, the Judge did not define "fraud", which is the very gist of the indictment.

F

Exception was taken (3434) to the failure of the Court to charge as to the Army requirement of three months' basic training, in accordance with Request to Charge No. 32 at folios 3279-80. Exception was also taken to the fail-

ure to charge that the commando unit was a voluntary organization, requiring consent, in accordance with Request No. 34 (3281-3). These were very important matters under the theory of the defense. The commando unit in fact did not want men of the type of Martin Bayer and Melvin Usdan. They had neither the training nor the physical equipment for such work. Nor had they volunteered for it. Col. Boebel said he did not want them (791-2; 795-6; 817-18). The attempt on the part of Radovich to include them therein was part of his scheme of extortion. The Judge, therefore, should have charged as requested, since these matters bore directly upon the defense.

G

Exception was also taken (3437-8) to the failure of the Court to charge on the irrelevant and immaterial matter in the statements of the Bayers, as requested in Request No. 48 (3298). The Judge himself had stated that these statements contained "a substantial amount of matter which is immaterial and irrelevant" (1075). He had first excluded these statements completely for that reason (1074-5). Later, the Court reversed itself and admitted these statements over objection and exception (1469-85). Yet the Court failed to charge that the jury should not consider the irrelevant and immaterial matter which abounds throughout these statements (*Schmeller* v. *U. S.*, 143 F. 2d 544).

H

Exception was taken (3443-4) to the Court's failure to charge that part of Request No. 65 (3326-7), that if the payments, etc., were made to Radovich in order to have him perform his lawful duty, they are not evidence of an attempt to defraud the United States. This failure to charge is substantial error because the theory of the defense is that the Bayers were coerced and that Radovich had to be paid in order to induce him to *do* his true duty.

Therefore, if Radovich did merely what he was obligated to do, no crime would be committed. This matter is of much importance because Radovich, had no right to include the two boys in the Conchando unit, indeed his duty was to *ex*clude them—NOT to *in*clude them.

I

In Answer to the Government's Contention

The Government states under the heading "Questions Presented" in Subdivision 4, at page 3 of its petition, that the Trial Judge's statement concerning the defense of extortion was "concededly proper". This statement is repeated at pages 36-7 and it is added that a charge need not be "verbose".

Of course, we do not concede that the charge was "concededly proper". Likewise, we have not argued that the charge must be "verbose". The charge was erroneous and misleading because the Court nowhere clearly and definitely instructed the jury that if the agreement by the Bayers to make the payments was made involuntarily and under coercion and duress, that fact would negative in law the existence of any mutual agreement or conspiracy between the defendants. The misleading portions of the charge, above quoted, were so intertwined with the remainder as to confuse and mislead the jury. The language of the Court at folio 3403, quoted in Subdivision "B", *supra*, was particularly confusing. It began with the word "However", and, in effect, negatived what the Court had said previously. The trial counsel for defendants Bayer realized that the charge would be actually misleading to a jury of laymen and, therefore, took exception (3436).

The jury should have been instructed, in so many words, that if the so-called agreement was coerced from the Bayers by threats and duress, then the agreement itself and any payments made under it were not voluntary, and that in such event the jury should acquit the Bayers.

The error is emphasized by the failure of the Trial Judge to charge, as requested in Request No. 65, that if the payments were made to Radovich in order to have him perform his lawful duty, they would not be evidence of an attempt to defraud the United States. Exception was taken to the failure to so charge (3443-4; Subd. "H", *supra*).

It follows that the Circuit Court of Appeals was entirely correct in holding that error was committed in the foregoing respects.

POINT II

Reversible error was committed by the Trial Court in refusing permission to put in evidence the slip of the Telephone Company showing that a collect call was made by Radovich from Arlington to Bayers' office in New York City on November 24, 1943, and in denying the motion of the defense for a new trial after refusing to receive the slip in evidence.

Serious error was committed by the Trial Court in refusing to receive in evidence the record of the Telephone Company, which shows that a telephone call was made collect by Radovich from Arlington, Virginia, just outside of Washington, to Bayers' office in New York City on November 24, 1943 (3508-19). Exception was taken (3519).

In order to understand the gravity of this error and the serious damage which it occasioned to the defense, it is necessary to examine the background.

Miss Solomon, testifying for the defense, stated that Radovich telephoned her one morning in November 1943 from Washington and she made an appointment for Samuel Bayer and her to meet him at Cavanagh's Restaurant in this city (2779-80). He there made threats that the two boys would have to go with him on his commando mission and, if lucky, they would come home alive (2784-7). He further stated that he had broad authority and if Bayer

paid him $5,000 he could have the boys transferred into some other unit (2785-7). This took place *on the same day* that Martin Bayer called his father and told him that he and his cousin Usdan were being transferred to Goldsboro, North Carolina (2788). Samuel Bayer says the same thing in his statement (Exh. 8; 3686-9).

Melvin Usdan testified that he and Martin Bayer phoned to their folks on November 24th, telling about their transfer to Goldsboro (2582-7). The date (November 24th) was thus definitely fixed; and the U. S. Attorney, in his summation, referred to Usdan's statement as accurate (3213-14).

In his summation the U. S. Attorney laid great stress upon the fact that Radovich was in Goldsboro on November 24th (3211-17), since Miss Goertz had testified (766-7) that Radovich phoned her from there on that date concerning the transfer of Martin Bayer and Usdan. He argued accordingly that Samuel Bayer's statement and the testimony about the attempted extortion by Radovich at Cavanagh's Restaurant on November 24th were false, *since Radovich was in Goldsboro at that time*. He characterized it as "just another of the falsehoods" (3216). He said that it showed "the absurdity of Samuel Bayer's claim of extortion" (3216). This was at the very conclusion of the summation, and court then adjourned to the next day (3219-20).

On the next morning, Mr. Keenan (trial counsel for the Bayers) informed the Court in chambers (3347-52) that, in view of the statements in the U. S. Attorney's summation, above referred to, he was checking with the Telephone Company and that the Government must have among the records of the Bayers, which it had subpoenaed, a record of a collect call from Washington on November 24th. He also stated that he wished to show that Radovich was in New York, as testified to by Miss Solomon, on November 24th and 25th (3352-3).

The Government admitted that Bayers' records had been subpoenaed (3355) and agreed to look up the records as to telephone calls during that time (3372-3).

The Government, shortly thereafter, produced from its files a *bill* of the Telephone Company, showing a collect call to Bayers' office from Washington on November 24th (3373-4).

After some discussion the Court stated that it was willing and agreed to tell the jury that there was such a collect call made to the Bayers from Washington on November 24th (3376-7). The Court, however, ruled that it would refuse to state to the jury that the records had been in the Government's possession, to which refusal exception was taken (3383-4).

This was all in chambers and outside of the hearing of the jury (3347).

Proceedings were then resumed in open court in the presence of the jury (3385). The Court proceeded to tell the jury, at the outset of its charge, that the Telephone Company bill showed a collect call from Washington to the Bayers on November 24th, but added somewhat pointedly that "the record *does not show from whom the call came*" (3386-7).

It can be seen that what the Court said concerning the bill of the Telephone Company *failed to connect Radovich with the collect call.*

The jury retired at 11:45 A. M. and returned for further instructions at 3.45 P. M. (3461). At that time Juror No. 6 asked to hear again the U. S. Attorney's summation concerning the messages and meetings on November 24th and 25th (3487-8; 3499). Very evidently the juror had in mind that part of the summation in which it was urged that Radovich could not have been in New York on November 24th in view of Miss Goertz's testimony that he telephoned to her from Goldsboro on that date. Another juror asked for references to the evidence as to those dates (3499).

The Court, in response to this request, referred to the testimony of Miss Goertz, Miss Solomon and Usdan in reference to the dates (3500).

In this connection it should be noted that the statement of Radovich made to the F. B. I. agents, dated March 15, 1945 (Govt.'s Exh. 25), does not touch upon the telephone call by Radovich to Bayers' office on November 24, 1943, nor upon his conference with Samuel Bayer and Miss Solomon at Cavanagh's Restaurant on that date, nor upon what transpired thereat and thereafter. These omissions are significant in view of the fact that Samuel Bayer's statement taken February 7, 1945 (Govt.'s Exh. 8) particularly mentioned these facts and circumstances (Exh. 8, at fols. 3686-9). The Radovich statement merely and only sets forth the following (Govt.'s Exh. 25 at fol. 3931):

> "About Oct. 1943 I called Sam Bayer from Washington D. C. and told him that everything was arranged. He agreed to have Elias Bayer meet me at Goldsboro, North Carolina about midnight on about the 27th or 28th of November, 1943. It had previously been agreed that Sam Bayer would give me $5,000 and an extra $1,000 for arranging these transfers."

Besides being vague and general, the foregoing statement is quite incredible because it would be impossible for Radovich, a flyer with important duties, to arrange in October 1943 to have Elias Bayer meet him at a certain specific time and place on November 27th or 28th, 1943. Even more important, however, is the careful omission from the statement of Radovich of any mention of his telephone call to New York on November 24, 1943, followed by his visit to New York City, in the course of which he met Samuel Bayer and Miss Solomon at Cavanagh's Restaurant. It was during this conference that Samuel Bayer states, and Miss Solomon testified, that extortionate demands were made by Radovich to include the boys in the dangerous commando mission to Burma, for which the boys were entirely unsuited and unprepared, unless he (Radovich) received $5,000 from Bayer.

The jury thereupon again retired at 4:27 P. M. (3506). After the jury retired, Mr. Cohen, the associate defense counsel for Bayers, called to the Court's attention that

the Court had stated to the jury that while there was evidence that a telephone call had been made from Washington on November 24th there was no evidence as to who made the call, to which the Court responded that he recalled saying that there was no evidence on the record (3508). Thereupon Mr. Cohen stated that the defense did not know that the U. S. Attorney was going to make such a point and had made it only in his summation, and that since that time the defense had started a check of the records and had secured the record of the Telephone Company, in the form of a slip, showing that the call was made *by Radovich* (3509). Mr. Cohen then asked leave to put the Telephone Company slip in evidence and emphasized that this was "highly important in view of the statements made by the jury to your Honor" (3509-10). He also emphasized the statement made by one of the jurors "for further information concerning those dates" (3509). He exhibited the slip of the Telephone Company in open court (3510). It shows an Arlington, Virginia, call collect to Bayefs' office *by Radovich* (Captain Ravich) on November 24, 1943 (3509-13).

After some argument, Mr. Cohen again stated that the matter "is of great moment to the jurors, as your Honor could see from the question asked by Juror No. 6" and he emphasized that the whole matter grew out of the Government's summation to the jury (3515).

The Court refused, however, to admit the Telephone Company's slip in evidence (3517-18) since the Court stated that it showed an Arlington call, not a Washington one, and since the case had been closed. The Court further stated (3518) that the Court's procedure in the morning in referring to the Telephone Company bill in his charge had been "irregular, to say the least, and I am not going to make it more irregular * * *".

Exception was taken to the ruling of the Court (3519). A motion was also made either for a mistrial or a new trial, which was denied, and exception again taken (3519).

This ruling was serious error. The case was still within the Court's control and was being considered by the jury, and, in view of the importance which this issue had assumed, the jury should not have been left with a fragmentary and distorted picture of the facts.

While the Telephone Company *bill* showed that a collect call was made to Bayers from Washington on November 24th, it did not show who made the call. Indeed, the Court stated that the bill did not show this fact. Therefore, the Telephone Company's *slip*, which Mr. Cohen desired to put in evidence, was vitally important because it would show that Radovich had telephoned to the Bayers' collect on November 24th from Arlington, which is where Radovich had been working with the Military Personnel Division, just outside of Washington and that, therefore, the statement of Bayer and the testimony of Miss Solomon were accurate and truthful and that they were *not* "just another of the falsehoods". In fact, in view of the question and remark of Juror No. 6, this matter went to the heart of the case because it shows that the jury was vitally concerned with this issue.

It follows that the Court committed serious error in excluding the slip of the Telephone Company because only a fraction of the facts—and not the whole picture—was before the jury. The verdict might well have been different had the jury been in possession of the entire facts.

In Answer to the Government's Contentions

The Government urges: (1) that when this Telephone Company slip was offered, the jury already had the case under consideration, and (2) that the slip itself was immaterial and that the United States Attorney did not directly question the meeting in New York on November 24, 1943.

These contentions are without merit. While it is true that the Trial Judge possesses discretion as to the reopening of a case for further evidence, as stated in the cases cited at page 36 of the Government's petition, in view of

the great importance which this issue had assumed and in view of the questions and remarks of several of the jurors, the jury should not have been left with a fragmentary and misleading picture of the actual facts.

In the present case, the ultimate issue of fact to be determined by the jury was a very simple one, to wit: whether the Bayers were corrupting Radovich to do less than his duty or whether, on the other hand, they yielded to extortion in the hope that he would do his full duty.

In the closing events of the trial, the crux of this issue came to depend very largely on the whereabouts of Radovich on November 24, 1943. The record shows conclusively that his whereabouts on that date were regarded, at the close of the trial, by the prosecutor, the defense, the Trial Judge, and, above all, the jury, as highly material in determining the truth as to the issue between corruption and extortion.

At page 1071, folio 3213, the prosecutor said at the close of his summation:

> "Now you will recall that neither Sam Bayer in his statement nor Miss Solomon in her testimony from the stand was able precisely to fix that date of that meeting in Cavanaugh's restaurant, but young Melvin Usdan fixed it precisely. He testified that he and Martin arrived at Goldsboro, North Carolina, on November 25th, and he testified that they had left Westover the day before, November 24th. He testified that the date he left, the 24th, he phoned his family and Martin Bayer phoned his father, Samuel Bayer. So that the date, the date of the telephone call which informed Sam Bayer of the transfer is definitely fixed and since that is the date that Sam Bayer says he met Radovich at Cavanaugh's, the date of that meeting at Cavanaugh's is fixed definitely and precisely as the 24th of November, 1943.
>
> So, on the very day, November 24th, that Radovich, according to Bayer, is making the first threats here in New York to take these boys unless he got $5,000, Radovich, according to Miss Goertz, is actually in Goldsboro, North Carolina, and is calling Miss Goertz

from Goldsboro to Washington and asking her to issue the orders transferring the boys as surplus out of the Air Commando unit and into the Air Transport Command. Her testimony is clear, it is exact, and it is uncontradicted. She fixed November 24th definitely as the date that Radovich called her from Goldsboro and asked her to issue the orders transferring the boys out of the Air Commando group to the Air Transport Command. * * * "

Then at folio 3216, the prosecutor added:

"So that the absurdity of Sam Bayer's claim of extortion is apparent, it is glaring. It is just another of the falsehoods which have characterized his statements continuously since August, 1944."

Thus, the prosecutor's final "knock-out punch" was that the defense's version of November 24th was "another falsehood", because Miss Goertz placed Radovich as then in Goldsboro.

Hence, the statement in the Government's petition (p. 35) that, "The United States Attorney did not directly question the alleged meeting in New York", is erroneous and misleading.

In the prosecutor's summation, he correctly fixed the date when the boys left New England for Goldsboro as November 24, 1943, and the date of their arrival at Goldsboro as November 25th (3213). In consequence, on November 24th the boys were actually in transit from New England to join the Burma Commando Expedition being organized at Goldsboro, North Carolina.

Obviously, therefore, according to the Government's own account, on November 24, 1943, Radovich had the stage perfectly set for effective coercion of the Bayers. The picture he could place before the Bayers was that of the boys actually in his power as part of his commando unit which he could truly represent as "a very dangerous mission" that "would write history" (2784, 3687-8)—from which mission "if the boys were lucky enough to return they would return in eight months" (2784-5, 3688).

Obviously, if the jury knew—particularly in view of the questions which they themselves asked when they returned for additional information—that Radovich telephoned from the Pentagon Building to the Bayers on November 24th while the boys were in transit to his commando unit (as Miss Solomon testified) and that Radovich came to New York to see the Bayers on that very day, the jury could readily have found—indeed would inevitably have found—that Radovich thus came to New York to extort from the Bayers the payment of this great sum of money, so huge and characterizing as to be decisive of the truth of what was going on between the Bayers and Radovich. In other words, if Radovich came to New York on November 24, 1943, the triers of fact could very easily believe that he did so for the purpose of preying on the Bayers, and that the meeting which he then and there had at Cavanagh's restaurant and the threats which he there uttered took place precisely as testified by Miss Solomon and as narrated in the statements made by Samuel and Elias Bayer.

Hence, what we conceive to be the extreme injustice of the present situation is that this telephone slip was excluded from the consideration of the jury, and even was not allowed effect on our application for a new trial on the ground of newly discovered evidence. In other words, the triers of fact never saw it although it was available to them before they reached their verdict and although it was a probative answer to the very questions which they asked while deliberating. And no triers of fact could ever see it unless a new trial was granted.

The same logic and the same essential justice which moved the Trial Court to reopen the case for the purpose of telling the jury about the *telephone bill* of December 1st showing a charge to the Bayers by the Telephone Company for a collect charge from Washington on November 24th, should have moved the Trial Court to receive the *Telephone Company's* slip which showed that the telephone call was from the Pentagon Building in Arlington and by Radovich himself. That this call was the one charged for on the Tele-

phone Company's bill of December 1, 1943, is shown by the fact that there was no other charge for any telephone call from the Capitol area on that date. Obviously, the Telephone Company billed Arlington calls under Washington. In refusing to allow the slip to be placed before the jury, the Court said (among other things) (3517):

> "I know that Arlington and Washington are near each other. Conceivably it may be the same call, but it is not conclusive."

For the reasons stated, we believe that the identity between the call on the slip and the call on the bill was conclusive; but, even if not conclusive, the question of identity was vital and was for determination by the jury through comparing the two records in the light of the evidence, particularly Miss Solomon's testimony. We submit that, in view of the fact that the Trial Court, in reopening the case so that the jury could hear the contents of the Telephone Company's bill, had stated to the jury that the bill "does not show from whom the call came" (3386-7), the Trial Court was bound by its own logic and because of this very statement on its part and in the interest of full justice, to let the jury know that an answer (or at least a highly probable answer) to the source of the call had been found and that such source was *Radovich himself*.

It will not do for the Government's counsel now to argue that the question of a meeting in Cavanagh's restaurant on November 24th was immaterial (p. 35). In the first place, Radovich could have come to New York on November 24th and sought such a meeting for one purpose only—to place before the Bayers what he knew would be the frightening picture of their boys then actually in transit to his commando unit in Goldsboro where they would be completely in his power.

Such was not the argument or the significance of the prosecutor's closing statements to the jury. The present change in position seems to us to be merely a tribute to the force and conclusiveness of the telephone slip which

subsequently came before the Trial Court. The prosecutor made no concession before the jury that the meeting at Cavanagh's restaurant on November 24th had in fact occurred or that, if it had occurred, such fact was immaterial. On the contrary, the climax of his argument was the very opposite, to wit: that the story as to the meeting at Cavanagh's restaurant was a falsehood, and was demonstrated to be so by paralleling the testimony of Miss Goertz over and against the testimony of Miss Solomon and the statements of the Bayers as to what had occurred on November 24th.

The queries by the jury, which occurred at folios 3487-8 and 3498-9, showed that the concluding paragraphs of the prosecutor's summation had made a deep impression and had become the subject of discussion in their deliberations.

Moreover, it is utterly inconceivable that if the Trial Court itself had not appreciated the importance and materiality of the prosecutor's closing remarks and the consequent importance of determining just where Radovich was on November 24th, and particularly whether he was or could have been in New York on that day, the Trial Court would have taken the unusual course of giving to the jury, on the morning following the close of the summations, the contents of the Telephone Company's bill.

The Trial Court's appreciation of the importance and materiality of this subject is also made perfectly plain by the fact that the Court, in taking this action, responded to a request of defense counsel and to the argument of defense counsel that the prosecutor's summation had taken the defense by surprise, that the prosecutor's claim that the meeting at Cavanagh's restaurant could not have occurred had caused them to demand an opportunity to see the telephone records seized by the Government from the Bayer concern, and that the aforesaid bill (then discovered as in the Government's possession) was some proof that Radovich was not in Goldsboro on November 24th but rather was in Washington demanding an immediate appointment and conference in New York (3347 *et seq.*).

By notice of motion and petition, dated March 8, 1946, the defendants Bayer moved in the Circuit Court of Appeals to suspend appellate proceedings and to remand the case to the District Court for the purpose of entertaining a motion for a new trial on the ground of newly discovered evidence, pursuant to Rule 33 of the new Rules of Criminal Procedure. This petition was accompanied by affidavits of Elias Bayer, Anne Solomon, Walter V. Radovich, Robert T. Murphy and Willis Mahoney. Accompanying the petition also were a copy of the Telephone Company slip and of the testimony of Miss Goertz in the court-martial proceeding against Radovich. Her testimony in that proceeding was materially different from her testimony on the trial concerning the dates beginning with the middle of November, 1943. In the court-martial proceeding she gave the date of Radovich's telephone call from Goldsboro as November 22nd, whereas at the trial she fixed November 24th as the date. The affidavit of Radovich shows that he was not in Goldsboro on November 24th. It further shows that he was in Washington in the morning of that date, and that he was in New York City between November 22nd and November 25th. His affidavit states that he had lunch with Miss Solomon and Samuel Bayer, after which they took him in a taxi to LaGuardia Airport and that the date could have been November 24th and that he cannot say that it was not. All of the papers used on said motion were received before the Circuit Court of Appeals upon the argument and are on file. Certified copies are on file in this Court.

Certainly, the jury's verdict might well have been different, in view of the jurors' questions and remarks, had they known that Radovich made the telephone call from Arlington on November 24th and that he was in New York on November 22nd, 24th, 25th and 26th, as stated in his affidavit, and that there is no evidence that he was in Goldsboro on November 24th or 25th.

POINT III

The basis of the reversal in the Circuit Court of Appeals was the errors committed to the prejudice of the defendants Bayer.

The Circuit Court of Appeals based its reversal of the conviction of the Bayers upon two propositions: (1) The confusing and misleading charge concerning their defense of extortion; and (2) the error committed in excluding the Telephone Company slip.

The opinion on these two propositions begins at page 1467 and terminates at page 1473. It is then stated in the opinion at page 1473 on lines 14-15:

> "In view of the charge of conspiracy, reversal as to the Bayers necessitates also a reversal as to Radovich."

The opinion might then and there have been terminated. The Circuit Court of Appeals, however, then proceeded to consider two claims of error assigned by the defendant Radovich in connection with the admission in evidence of signed statements, which it was contended that he had made. These claims of error in no wise affected the appeal of the defendants Bayer. The Government's argument, accordingly, in the 1st paragraph of the subdivision numbered "3", at page 34 of the petition, is sophistry and without merit. It is a *non sequitur*, because the judgments of conviction were not reversed as to the Bayers on account of the admission of Radovich's statements. To the contrary, the conviction of Radovich, as one of the alleged conspirators, was reversed on account of the errors committed as to the Bayers in connection with the charge and the exclusion of the Telephone Company slip. Neither of these errors involves any important question of law or public policy.

It is elementary that a writ of certiorari will not be granted unless the question of law is novel, or involves

public policy, or has been differently decided by the Circuit Courts of Appeal. There is no such proposition involved herein.

The Circuit Court of Appeals found, as to the Bayers, that the charge was confusing and that the telephone company slip was improperly excluded. Neither of these matters is of a nature that requires a review by this Court.

The ends of substantial justice required that the Circuit Court of Appeals should order a new trial in this case, as it did.

CONCLUSION

For the foregoing reasons it is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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